

**IN THE INDIANA COURT OF APPEALS
CASE NO.: 82A02-0103-CV-111**

KIRIT C. SHAH, M.D.,)	Permissive Interlocutory Appeal From
)	The Vanderburgh Circuit Court
Appellant,)	
)	Trial Court Case No.:
vs.)	82C01-0007-CT-357
)	
STAN HARRIS AND NANCY HARRIS)	The Honorable
)	Carl A. Heldt, Judge
Appellees,)	
)	

BRIEF OF THE APPELLEES STAN AND NANCY HARRIS

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I. TABLE OF CONTENTS

	<u>Page</u>
II. TABLE OF AUTHORITIES.....	ii
III. STATEMENT OF ISSUE.....	1
IV. STATEMENT OF THE CASE.....	2
V. STATEMENT OF FACTS.....	4
VI. SUMMARY OF ARGUMENT.....	4
VII. ARGUMENT.....	6
A. Standard of Review	6
B. Discussion	6
VIII. CONCLUSION.....	11
Word Count Certification	11
Certificate of Service	12

II. TABLE OF AUTHORITIES

CASES:

	<u>Page</u>
<i>Boggs v. Tri-State Radiology, Inc.</i> 730 N.E.2d 692 (Ind. 2000)	10
<i>Coffer v. Arndt</i> , 732 N.E.2d 815 (Ind. App. 2000)	10
<i>Downs v. Panhandle Eastern Pipeline Co.</i> , 694 N.E.2d1198, 1200 (Ind. Ct. App. 1998) trans denied 706 N.E.2d 178	6
<i>Estate of Pflanz v. Davis</i> , 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997)	6
<i>Halbe v. Weinberg</i> 717 N.E.2d 876 (Ind. 1999)	9,10
<i>Ling, et.al. v. Board of Trustees of Vermillion County Hospital v. Stillwell, et.al.</i> 732 N.E.2d 1270 (Ind. App. 2000)	8
<i>Martin v. Richey, Jr., M.D.</i> 711 N.E.2d 1273 (Ind. 1999)	6, 7, 8, 9, 10, 11
<i>Weinberg v. Bess</i> , 717 N.E. 2d 584 (Ind. 1999).....	9
<i>Van Dusen v. Stotts</i> , 712 N.E.2d 491 (Ind. 1999)	1, 6, 7, 8, 10, 11

OTHER AUTHORITIES:

Indiana Constitution, Article I, Section 12	7
Ind. Code 34-18-7-1 (b)	7
Ind. Medical Malpractice Act 34-18-1-1	4, 7
Ind. Trial Rule 56(c)	6

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III. STATEMENT OF ISSUE

Whether the appellant (Kirit C. Shah, M.D.) has met the burden that the trial court erred when it denied his Motion for Summary Judgment on the basis that there is a genuine issue of material fact with regard to when the appellees (Harrises) discovered the alleged malpractice and resulting injury or facts, that, in the exercise of reasonable diligence, should have led to the discovery of the alleged malpractice and resulting injury in following the precedence of Van Dusen v. Stotts, 712 N.E.2d 491 (Ind. 1999); and further, the ruling of the trial court that Harris may, indeed have filed their complaint within the two years after said discovery and therefore within the statute of limitations as set forth in Van Dusen; and with that fact undecided, whether Kirit C. Shah's M.D.'s Motion for Summary Judgment was properly denied?

IV. STATEMENT OF THE CASE

Stan and Nancy Harris, by counsel, Glenn A. Deig, filed their Proposed Complaint with the Indiana Department of Insurance and their Complaint for Damages in the Vanderburgh Circuit Court on July 24, 2000 alleging the medical acts and omissions of Kirit C. Shah, M.D. were negligent and a proximate cause of their damages. By subsequent letter, the Indiana Department of Insurance informed Stan and Nancy Harris that Kirit C. Shah, M.D. was a qualified healthcare provider. The parties, by counsel, agreed to Paul Black as Panel Chairman and were in the process of selecting the remaining Medical Review Panel.

On October 10, 2000, the defendant, Kirit C. Shah, M.D. by counsel, A.J. Manion, and Stan and Nancy Harris, by counsel, Glenn A. Deig, met with the court and indicated that this matter was before the Medical Review Panel and by agreement, a status conference was reset until October 20, 2001.

On December 14, 2000, the defendant, Kirit C. Shah, M.D. by counsel, Rebecca Kasha and A.J. Manion filed Defendant's Motion for Summary Judgment, Defendant's Designation of Materials in Support of Motion for Summary Judgment, Memorandum of Law in Support of Motion for Summary Judgment, and Proposed Order of Summary Judgment. The Plaintiffs, Stan and Nancy Harris, by counsel, Glenn A. Deig, filed their Reply Brief of Plaintiffs in Opposition to Defendant Kirit C. Shah, M.D.'s Motion for Summary Judgment on January 16, 2001. On January 25, 2001, the Defendant, Kirit C. Shah, M.D. by counsel filed his Reply Memorandum. On January 30, 2001, the plaintiffs by counsel, Glenn A Deig; and defendant, by A.J. Manion, and the court by Judge Carl Heldt met for a hearing on Defendant's Motion for Summary Judgment. After considering the arguments and written materials submitted by the

parties, the court entered a minute entry which denied defendant's Motion for Summary Judgment, which was later amended on February 7, 2001 to read as follows:

THE COURT HEREBY AMENDS ITS MINUTE OF 1/30/01 TO READ AS FOLLOWS: PLAINTIFFS BY GLENN DEIG; DEFT. BY A.J. MANION. HEARING HELD ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, COURT FINDS THAT A MATERIAL ISSUE OF FACT EXISTS WITH REGARD TO WHEN THE PLAINTIFFS DISCOVERED THE ALLEGED MALPRACTICE AND RESULTING INJURY OR FACTS THAT, IN THE EXERCISE OF REASONABLE DILIGENCE, SHOULD HAVE LED TO THE DISCOVERY OF THE ALLEGED MALPRACTICE AND RESULTING INJURY. CONSEQUENTLY, IN ACCORDANCE WITH VAN DUSEN VS. STOTTS, 712 N.E.2D 491 (IND. 1999), THE PLAINTIFFS MAY, INDEED, HAVE FILED THEIR COMPLAINT WITHIN TWO YEARS AFTER SAID DISCOVERY AND THEREFORE WITHIN THE STATUTE OF LIMITATIONS AS SET FORTH IN VAN DUSEN. WITH THAT ISSUE OF FACT UNDECIDED, THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

On February 9, 2001, the Defendant, Kirit C. Shah, M.D. by counsel, filed his Petition to Certify for Interlocutory Appeal. On February 15, 2001, the Defendant's Petition to Certify for Interlocutory Appeal was Granted. On April 6, 2001, the Clerk of the Court of Appeals filed an Order that the Appellant's Petition for Leave to File Permissive Interlocutory Appeal was granted, and this court now accepted jurisdiction of this Appeal, pursuant to Appellate Rule 14B; counsel were advised that this appeal shall proceed under the 2001 version of the Appellate Rule 14B. On April 16, 2001, the defendant, Kirit C. Shah, M.D. by counsel, Rebecca Kasha filed his Notice of Appeal. On April 25, 2001, Notice of Completion of Clerk's Record was sent to Court of Appeals and all parties of record.

V. STATEMENT OF FACTS

Stan Harris was first treated by the defendant, Kirit C. Shah, M.D., a neurologist on June 20, 1991. (Appellant's App. P7, Complaint ¶3) On or about July 11, 1991, Kirit C. Shah, M.D. diagnosed Stan Harris as having multiple sclerosis. (Appellant's App. P. 7, Complaint., ¶ 4.) Stan Harris was last treated by the defendant Kirit C. Shah, M.D. on April 12, 1993. (Appellant's App. P. 7, Complaint ¶3.) On or about July 31st, 1998, another physician diagnosed Stan Harris as suffering from a vitamin B-12 deficiency, and not from multiple sclerosis. Stan Harris first learned that he did not have multiple sclerosis and the diagnosis and care and treatment by Kirit C. Shah, M.D. was below the appropriate standard of care. (Appellant's App. P. 7, Complaint ¶5).

Stan Harris, along with his wife, Nancy Harris, simultaneously double-filed on July 24, 2000 a Proposed Complaint with the Indiana Department of Insurance, and a Complaint for Damages in the Vanderburgh Circuit Court alleging that the defendant had negligently misdiagnosed him as having multiple sclerosis and as a proximate result, incurred damages. The Indiana Department of Insurance later informed Stan and Nancy Harris by standard notification letter that Kirit C. Shah, M.D. was a qualified healthcare provider under the Indiana Medical Malpractice Act.

VI. SUMMARY OF ARGUMENT

Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. At the trial court level, the appellant Kirit C. Shah's, M.D.'s Motion for Summary Judgment was properly denied since the trial court found the existence of genuine issue of material facts that precluded summary judgment. On

appeal, evidentiary material should be construed in the light most favorable to the Harrises.

Further, the moving party, Kirit C. Shah, M.D. has the burden of persuading this appellate court that the lower trial court erred.

Indiana case law strongly supports the position of the Harrises. The Indiana courts have consistently held that it would be an unconstitutional application of the statute of limitations to prevent plaintiffs, such as the Harrises, from filing their claim, before plaintiffs either know of the malpractice and resulting injury, or discover facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. The undisputed facts are that the Harrises could not have discovered the malpractice and the resulting injury until more than two (2) years after the occurrence of the alleged malpractice. Under these circumstances, the decisions of the appellate courts have all held that the plaintiffs would have two (2) years from this discovery to file their claim. The Harrises did so, and their claim was properly filed.

The Indiana cases and argument of Kirit C. Shah, M.D. are without merit. The cases cited by Kirit C. Shah M.D. which addressed the situation when the plaintiffs discover the malpractice and injury well within the original two (2) year period and fail to file their complaint within the remaining time left do not apply to the Harris' claim. Also, the argument, and cases cited by Kirit C. Shah, M.D. regarding the doctrines of fraudulent concealment and tolling are not applicable to this case since the Harrises did not raise or argue these doctrines since they are not applicable. Consequently, the argument that the Harrises had only a "reasonable" amount of time, rather than a full two (2) years, after discovery of the potential malpractice claim, completely disregards the current law in the State of Indiana.

This appellate court should affirm the decision of the trial court in denying Kirit C. Shah,

M.D.'s Motion for Summary Judgment.

VII. ARGUMENT

A. Standard of Review

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). Relying upon specifically designated evidence, the moving party (Kirit C. Shah, M.D.) bears the burden of showing that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Estate of Pflanz v. Davis, 678 N.E.2d 1148, 1150 (Ind. Ct. App. 1997). If the moving party (Kirit C. Shah, M.D.) meets these two requirements, the burden then shifts to the non-movant (Harrises) to set forth specifically designated facts showing that there is a genuine issue for trial. Id. A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue. Downs v. Panhandle Eastern Pipeline Co., 694 N.E.2d 1198, 1200 (Ind. Ct. App. 1998), trans. denied, 706 N.E.2d 178.

On appeal, this Court is bound by the same standard as the trial court, and should consider only those matters which were designated to the trial court. Pflanz, 678 N.E.2d at 1151. The designated evidentiary material should be construed in the light most favorable to the non-moving party (Harrises) to determine whether there is a genuine issue of material fact. Id. Kirit C. Shah, M.D., the party that lost in the trial court, has the burden of persuading the appellate court that the trial court erred. Id.

B. Discussion

Kirit C. Shah, M.D. erroneously argues that Van Dusen v. Stotts, 712 NE 2d 491 (Ind. 1999), Martin v. Richey, 711 NE 2d 1273 (Ind. 1999), and the subsequent cases that followed these seminal cases do not apply to the facts before this Court today. The companion cases of Van Dusen v. Stotts, 712 NE 2d 491 (Ind. 1999) and Martin v. Richey, 711 NE 2d 1273 (Ind.

1999), hold that the Indiana Medical Malpractice Act, specifically Indiana Code §34-18-7-1 (b) permit the plaintiffs to file their claims within two (2) years of the date when they discovered the malpractice and the resulting injury or facts that, and exercise reasonable diligence, should lead to the discovery of the malpractice and the resulting injury when original discovery of the alleged negligence is made beyond the original two (2) year time limitations.

The Van Dusen court explained, in detail, discussing Martin v. Richey, 711 N.E.2d 1273 (Ind. 1999):

Specifically, we held in Martin that, under Article I, Section 12, the two-year occurrence-based statute of limitations may not constitutionally be applied to preclude the filing of a claim before a plaintiff either knows of the malpractice and resulting injury, or discovers facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. To do so would be to impose an impossible condition on her access to the courts and pursuit of their tort remedy. Van Dusen at 493.

The Van Dusen Court rejected the defendant's argument that plaintiffs should only have a "reasonable amount of time" to file their claims, as in fraudulent concealment cases, but the full two-year statute of limitations will be triggered upon discovery of the alleged negligence.

The Van Dusen Court explained that it would do violence to the Indiana Constitution, particularly access to the courts, if the legislature intended to create a statute of limitations that always runs from the date of the occurrence of the alleged negligent act, even when the malpractice and resulting injury cannot be discovered during the limitations period given the nature of the asserted malpractice and the medical condition. Id at 496. Likewise, in Martin v. Richey 711 N.E.2d 1273 (Ind. 1999) the Indiana Supreme Court held that the statute of limitations is unconstitutional as applied to the plaintiff in that case because it requires the plaintiff to file a claim before she is able to discover the alleged malpractice and her resulting injury, and therefore, it imposes an impossible condition on her access to the courts and pursuit of her tort remedy.

These cases do not hinge on the question of when the disease and its symptoms

manifested itself, or as Kirit C. Shah, M.D. incorrectly labels it (“latency exception”); but when a plaintiff either knows of the malpractice and resulting injury, or discovers facts, which in the exercise of reasonable diligence, should lead to the discovery of the malpractice and the resulting injury. In the Harris’ situation, they discovered that Stan Harris did not have multiple sclerosis when he was finally properly diagnosed with a vitamin B-12 deficiency on July 31, 1998. The Harrises did not know, nor could have known of their potential claim until July 31st, 1998. Under the Martin and Van Dusen cases, the Harrises two full years to file suit since discovery occurred outside the original two year period. Consequently, the Harrises had until July 31st, 2000 to have filed suit. They did so on July 24, 2000 which is within the two year time limitations and timely under current Indiana law.

Further, the position of Kirit C. Shah, M.D. that discovery of a cause of action is not relevant to the issues before this court today, is clearly incorrect and is not supported by the facts of this case. This completely disregards the discussion of Van Dusen where the court looked in Indiana cases in the area of product liability statutes of limitations and other tort claims for guidance of *when* discovery by a plaintiff triggers the time running to file his claim. Van Dusen at 497.

In addition, the arguments by Kirit C. Shah, M.D. regarding the tolling of limitations period by fraudulent concealment or equitable tolling was not raised, or argued, by the Harrises before the lower trial court since these doctrines are inapplicable to this case. The position of Kirit C. Shah, M.D. that the Harrises only had a “reasonable” amount of time after they discovered the potential malpractice (rather than 2 years) under the facts of this case directly contradicts the current law as espoused by Van Dusen, Martin, and their progeny.

There are several other Indiana cases that support of the position of the Harrises. The first relevant case is Ling, et. al. v. Board of Trustees of Vermillion County Hospital v. Stillwell, et. al., 732 N.E.2d 1270, (Ind. App. 2000). In the Stillwell case, the patient Doris Stillwell died while a patient of the Vermillion County Hospital and under the care of an employee nurse. A criminal

investigation started in March of 1995 due to the epidemic level of mortality at the hospital. There were several newspaper and news accounts of the investigation into the deaths before the two (2) year period from her death; but Stillwell had no reason to suspect that his mother's death had been involved in the nurses' criminal activity. In July 1997, Stillwell became aware of the circumstances surrounding her death and was part of the investigation. After becoming aware of these facts in July 1997, Stillwell filed a proposed complaint on September 5, 1997. The Hospital filed a Motion for Summary Judgment that the complaint was not timely filed within the statute of limitations since the complaint was not filed on or before August 1st, 1996, two years from her date of death and he was aware of the potential claim within the original two (2) year statute of limitations but failed to file the claim. The appellate court held that under the circumstances of this case, it would unconstitutionally deprive the claimant of a medical malpractice claim for her death. The court explained that even though the claimants were technically aware of the ultimate injury, the death, on August 1, 1994, the claimants had no reason to know that it was the result of possible malpractice until after the limitations period had passed. Following the reasoning as espoused in the Martin case, the appellate court upheld and affirmed the decision of the trial court in denying the Motion for Summary Judgment filed by the hospital.

Again, in Weinberg v. Bess, 717 N.E.2d 584 (Ind. 1999) and Halbe v. Weinberg, 717 N.E.2d 876 (Ind. 1999) two female patients were both falsely informed by the physician or his agents that their breast implants that were surgically implanted by this physician contained little or no silicone. The patients obtained their medical records and first became aware that their implants contained silicone. The Halbe court explained:

We reverse the trial court's grant of summary judgment in favor of Defendant in light of our holding in Martin v. Richey, 711 N.E.2d 1273 (1999), which established that the two-year medical malpractice statute of limitations is unconstitutional as applied to plaintiffs who are unable to discover their medical malpractice claims before the expiration of the limitations period. Even with the exercise of reasonable diligence, Halbe would not have discovered, and indeed did not discover, her medical malpractice until February 1992. On April 20, 1992, two months after she learned her breast implants contained silicone, she filed suit against Dr. Weinberg. Thus, her claim was filed within the statutory period of two

years. Id at 890.

The Halbe court further explained that “under Martin, a plaintiff need not possess the prescience to file a claim before he or she knows or has reason to know a claim exists.” Id at 891.

The only exception in current law established by Martin and Van Dusen is the situation when the plaintiff discovers the alleged negligence **before** the original statute of limitations had run. In Boggs v. Tri-State Radiology, Inc. 730 N.E.2d 692 (Ind. 2000), the court held that the patient who discovered the injury and alleged negligence eleven (11) months before the expiration of the original statute of limitations could, and should, have proceeded to Court within this time since it did not shorten the window of time so unreasonably as to make filing of the claim impractical. Clearly, the facts and law of the Boggs case do not apply since Stan Harris did not discover or could have known about the negligence and the injury until **after** the running of the original time limitations under any theory or argument.

Likewise, in the case of Coffer v. Arndt, 732 N.E.2d 815 (Ind. Ap. 2000) a patient was treated by an optometrist for eye examinations up through September or October of 1995. The patient was referred to an ophthalmologist on November 14, 1995 and was diagnosed by another ophthalmologist that the patient had glaucoma on December 19, 1995, and had it for several years while under the treatment of the defendant-optometrist. Like the Boggs case, the appellate court held that when he found out on December 19, 1995 that he had knowledge of facts that led, or should have led to the discovery of the alleged malpractice, he had twenty-two months remaining from the “occurrence” of the malpractice which was a reasonable amount of time left to have filed his claim. The Boggs and Coffer cases are clearly distinguishable from the facts of this case because the Harrises submitted evidence that they did not have knowledge, nor could have reasonably discovered, the alleged malpractice by Kirit C. Shah, M.D., within the two (2) years statute of limitations that were applicable which existed in the Boggs and Coffer cases.

In the case before the court today, it is agreed by the parties to this action, that the plaintiffs, Stan and Nancy Harris, did not discover, or could not have known of defendant’s

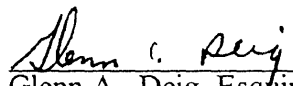
misdiagnosis and the resultant injury, until July 31st, 1998 which is after two (2) years from when Stan Harris was last treated, and misdiagnosed, by the defendant, Dr. Shah, M.D. Consequently, following the law as originally espoused in the Van Dusen and Martin cases, the plaintiffs in this case would have the full two (2) year time limitation to file suit (**July 31st, 2000**). The plaintiffs did file within two (2) years of discovery when they timely filed their claims on **July 24, 2000**.

VIII. CONCLUSION

The lower trial court properly found that a genuine issue of material fact existed that precluded summary judgment. The appellant, Kirit C. Shah, M.D. has failed to meet his burden that the trial court erred. Under current Indiana law, the Harrises had a full two (2) years from discovery of their claim to file their claim. The Harrises met this requirement and their claim should proceed.

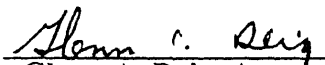
WHEREFORE, the Harrises respectfully request that this Appellate Court affirm the trial court in denying the Kirit C. Shah, M.D.'s Motion for Summary Judgment.

Respectfully submitted,


Glenn A. Deig, Esquire
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ATTORNEY FOR APPELLEES

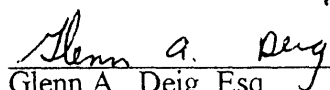
I hereby certify that this brief contains less than 14,000 words.


Glenn A. Deig, Attorney

CERTIFICATE OF SERVICE

I hereby certify that I have **HAND SERVED** a copy of the foregoing Brief of Appellees upon the attorney (or her agent) for the appellant, on the 21st day of June 2001.

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